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## **METRONET V. QWEST: AN ILLUSTRATION OF HOW *TRINKO* LIMITS ANTITRUST INTERVENTION IN THE TELECOMMUNICATIONS INDUSTRY**

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872 (2004), the Court imposed strict limits on the application of the antitrust laws in the telecommunications industry, insofar as those laws impose a duty to aid competitors. The Court noted that the "essential facilities" doctrine, under which a firm may have a duty to provide access to its facilities under some circumstances, had never been recognized by the Supreme Court. *Verizon* at 881. Further, the Court held the doctrine has little application where a state or federal agency has the power to compel sharing of facilities and that the Telecommunications Act of 1996 ("TCA") provides extensively for such power. In addition, the Court held that the holding in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, that a firm may be subject to Section 2 liability for refusing to deal with a competitor under some circumstances, is a very narrow exception to the general rule that a firm has no duty to aid its competitors and that liability for refusing to deal does not attach where the antitrust defendant is not repudiating an established (presumably profitable) prior course of dealing or is otherwise forgoing profitable sales in the short term for an anticompetitive purpose. *Id.* at 880. Finally, the Court held that courts should be hesitant to add new exceptions to the general rule that there is no duty to aid competitors, especially in an industry where there exists an extensive regulatory structure designed to combat anticompetitive harm. *Id.* at 881. The Court reasoned that allegations of antitrust violations in the telecommunications industry are difficult for courts to evaluate and lend themselves to "false positives" that have the effect of chilling the competitive conduct the antitrust laws are meant to protect. *Id.* at 882-83. Where there is already an extensive regulatory structure governing the conduct at issue, therefore, there is little to be gained from broadening the scope of antitrust intervention. *Id.*

In *MetroNet Services Corp. v. Qwest Corp.*, 2004 U.S. App. LEXIS 20107 (9<sup>th</sup> Cir. 2004), the Ninth Circuit applied the principles of *Verizon* to save Qwest, an incumbent local exchange carrier regulated by the TCA, from antitrust liability for altering its pricing structure in order to eliminate resale of its business phone services. Qwest sold a

package of phone services that allowed businesses to make internal and external calls and access calling features such as call forwarding and call waiting called “Centrex.” Initially, Qwest priced Centrex on a “per system basis” that based the price on the number of total phone lines purchased in the Centrex package, regardless of whether those lines were for a single location or multiple, separate locations. Customers that purchased Centrex for 20 or more total lines, regardless of where those lines were to run, received volume discounts. Thus, resellers such as plaintiff MetroNet would purchase Centrex at the volume discount and resell the service to multiple small businesses, each of which had twenty or fewer lines, for more than what the resellers paid and less than what their small business customers would have to pay for the Centrex package without the volume discount. In 1997, Qwest changed its pricing of Centrex to a “per location” system that required customers to have more than twenty lines at each location in order to receive a volume discount for service to that location. This pricing system eliminated the resellers’ ability to obtain the volume discounts since each of their customers had twenty or fewer lines and prompted MetroNet to bring suit against Qwest under Section 2 of the Sherman Act.

MetroNet claimed that, under the essential facilities doctrine, Qwest had a duty to provide access to its local exchange network. Citing *Verizon*’s observation that “where access exists, the [essential facilities] doctrine serves no purpose,” the Ninth Circuit held that the doctrine had no application because the TCA’s extensive compelled access provisions endowed the Washington Utilities and Transportation Commission (“WUTC”) with the effective power to force Qwest to provide access to its local exchange network to competitors. MetroNet argued that the TCA’s compelled access provisions should have no effect on its essential

facilities claim because they do not ensure access to Qwest’s local exchange network in a way that makes its resale business viable. The Ninth Circuit, however, held that the essential facilities doctrine only requires some sort of reasonable access to the essential facility in question, not access in a manner that ensures the profitability of the plaintiff’s particular business model. MetroNet also attempted to salvage its essential facilities theory by arguing that the WUTC, due to limited resources, limited statutory authority, and other reasons, must concede considerable latitude to Qwest in setting prices for access to its local exchange network. The Ninth Circuit was also unconvinced by this argument, explaining that *Verizon* only required that a state or federal agency has the power to compel sharing, not particular prices. Moreover, Qwest had entered into an interconnection agreement with MetroNet and other telecommunications carriers had successfully petitioned the WUTC to broker interconnection agreements with Qwest. As such, it was clear to the court that access to Qwest’s local exchange network was in fact available through the TCA and WUTC and the essential facilities doctrine was therefore inapplicable.

MetroNet also claimed that Qwest’s actions placed it in the exception to the general rule that there is no duty to deal with a competitor announced in *Aspen*. The court, however, found that *Verizon*’s interpretation of *Aspen* rendered it inapplicable to Qwest’s conduct. The defendant in *Aspen* halted its presumably profitable prior course of dealing with the plaintiff competitor and refused to sell to the plaintiff competitor at the same presumably profitable retail price it charged others. According to *Verizon*, these actions indicated a willingness to forego profits in the short-term in order to reap gains in the long-term from the resulting exclusion of competition. 124 S. Ct. at 879-80. Where there is no such forsaking of profits by the defendant in the short-term, *Verizon* holds that *Aspen* does not

apply. *Id.* The Ninth Circuit noted that Qwest's change to a per location pricing structure was an effort to *increase* profits in the short term and that Qwest had not refused to deal with MetroNet on the same terms that it deals with other customers. Hence, the Ninth Circuit held, MetroNet "does not have an actionable antitrust claim under the Supreme Court's existing refusal to deal precedents as explained and limited by *Verizon*."

Finally, the Ninth Circuit considered the possibility of departing from existing antitrust precedent and extending antitrust liability to Qwest's unilateral attempt to eliminate discount resellers. In light of *Verizon*'s admonition that courts should be hesitant to create new theories of antitrust liability because of the risk of false positives, especially where there is already a regulatory structure designed to combat anticompetitive harm in place, the court declined to do so. It noted that the WUTC closely regulated the competitive environment of the Washington telecommunications industry. It also observed that the WUTC had in fact been proactive in monitoring Qwest's attempts to eliminate the reselling of its phone services. Indeed, the WUTC had held a number of hearings on the issue and ultimately concluded that it would allow Qwest to use per location pricing. Thus, the court concluded, "the additional benefits of antitrust intervention would tend to be small given the existence of a regulatory structure designed to deter and remedy anticompetitive harm and the record of the WUTC's attentiveness to the alleged anticompetitive conduct."

*MetroNet* is a clear illustration of how the principles of *Verizon* operate to, in effect, shield regulated telecommunications firms like Verizon and Qwest from the scrutiny of the antitrust laws. The fundamental rationale underlying *Verizon*, and applied in *MetroNet*, is that the competitive behavior of these firms is already closely

scrutinized by the mechanisms of the TCA and other relevant authorities such that antitrust intervention would likely have little to add while risking the deterrence of conduct beneficial to consumers. As a result of these decisions, concerns about the unilateral competitive behavior of these types of telecommunications firms will likely have to focus on compliance with the TCA and the relevant state regulatory schemes, not the antitrust laws.

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### **"BITTER PILL" FOR PHARMA DEFENDANTS: SECOND CIRCUIT REVERSES SUMMARY JUDGMENT IN WARFARIN SODIUM ANTITRUST CASE**

The Second Circuit Court of Appeals on October 18 resuscitated the antitrust conspiracy and monopolization claims pursued by the manufacturer and distributor of a generic form of warfarin sodium, an anti-coagulant (blood thinner) medication that helps prevent blood clots that can cause strokes and heart attacks. In *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 2004 WL 2334907, the Second Circuit reversed the trial court decision handed down two years prior which entered summary judgment in favor of the defendants – a competing manufacturer and supplier of blood thinner medication – on the plaintiffs' claims under Sherman Act §§ 1 and 2.

A critical aspect of the decision was the Second Circuit's determination that the market for generic warfarin sodium constituted a "relevant market" separate and distinct from the overall market for warfarin sodium. Defendants Barr Laboratories (the manufacturer of a competing generic warfarin sodium) and Brantford (the supplier of a critical

component – clathrate), now face the possibility of treble damages and other costs because of their alleged conduct in depriving plaintiffs of the ability to market their generic product.

As this case demonstrates, the definition of the “relevant market” in an antitrust case can have critical consequences. The market definition provides the context against which to measure the competitive effects of the challenged conduct (here, the exclusive-dealing agreement between a manufacturer and supplier). The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output. The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm’s ability to raise prices above the competitive level. Reasonable interchangeability sketches the boundaries of a market. The Second Circuit observed that “there also may also be cognizable ‘submarkets’ which themselves constitute the appropriate market for antitrust analysis.” The court explained that “Defining a submarket requires a fact-intensive inquiry that includes consideration of ‘such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.’” (Quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). The court added that the term “submarket” is somewhat of a misnomer, since the “submarket” analysis “simply clarifies whether two products are in fact ‘reasonable’ substitutes and are therefore part of the same market. The emphasis always is on the actual dynamics of the market rather than rote application of any formula.”

The trial court ruled that the entire warfarin sodium market, including the non-generic version of the blood thinner drug sold by DuPont – Coumadin – was the appropriate market. It stressed that Coumadin and the generics shared a chemical equivalence, and that customers and vendors viewed the products as competing, and concluded that generics took market share from Coumadin. In reversing, the Second Circuit acknowledged it might “seem paradoxical . . . that Coumadin and generic warfarin – which have been certified by the FDA as therapeutically equivalent – are nevertheless separate markets for antitrust analysis.” But the court determined that the differences between the generic and established forms of the drug outweighed the similarities. The primary difference was price. Defendant Barr’s generic was introduced at about 70 percent of Coumadin’s price, and thereafter declined to 50 percent, while Coumadin’s price stayed steady, creating a marked gap in price between the products. Coumadin’s substantially higher price was “evidence of a distinct customer group with brand allegiance and/or high risk sensitivity that was unwilling to switch from the known brand name even in the face of a discounted alternative.” The court emphasized:

Coumadin’s substantially higher prices is evidence of a distinct customer group with brand allegiance and/or high risk sensitivity that was unwilling to switch from the known brand name even in the face of a discounted alternative. That this group has remained loyal despite Coumadin’s conspicuously higher prices strongly suggests inelastic demand. More significantly, this division of customers indicates there is little likelihood that price-sensitive generic customers would switch to the higher-priced Coumadin when faced with an increase in generic prices.

The Second Circuit's conclusion was further buttressed by the fact that when other generic competitors entered the market, Barr's prices dropped substantially, but Coumadin's remained virtually unchanged and even rose slightly.

An additional factor influencing the relevant market decision was the existence of different distribution chains for Coumadin and the generics. Wholesalers and chain pharmacies frequently stocked Coumadin plus a single generic version. "Thus, for a substantial customer base, generic warfarin manufacturers compete among themselves for one slot rather than with Coumadin." Similarly, there was evidence that Coumadin had been marketed primarily to doctors, while generics targeted wholesalers and certain pharmacies.

The court's conclusion that the relevant market excluded Coumadin had a major impact on the court's decision that the plaintiffs could proceed to trial on their Sherman Act claims. In reaching both determinations, the court relied on documentary evidence that the defendants intended to exclude plaintiffs and other generic manufacturers from the generic market, including the following:

- A memo from Barr's purchasing manager to its vice president and general counsel noted that there were only two potential purchasers of clathrate, and urged a strategy "to deny a viable source" to a competing generic manufacturer. Barr's director of pharmacology and senior president of operations added a handwritten note to the memorandum, asking if the expense of "purchasing the Coventry facility's supply (even though we can't use it), be less than our losses if [generic competitor] enters the market?" The court stated: "Defendants attempt to portray these notes as isolated thoughts of non-decision making employees, but we think a jury should decide what weight should be given these statements."

- A "Product Development Strategy" prepared for a Barr board of directors meeting stated that Barr focused on lower sales volume drugs with high barriers to entry that limit competition. The memo described Barr's efforts to secure a source of raw materials for generic warfarin sodium and noted that its "investment of time and capital resulted in an exclusive source of active ingredient that to date is the only source available to the generic industry."
- An internal Barr memo which contained a section entitled "Preserving Market Share: Warfarin Case Study" included the headline "Block Generic Competition by Controlling Raw Materials."

The court also pointed to plaintiffs' claim that Brantford, acting in tandem with Barr, had improperly helped to prevent plaintiffs from pursuing a new source of clathrate by failing to reveal the existence of the exclusive dealing arrangement between Barr and Brantford and otherwise engaging in conduct that engendered false hope within plaintiffs.

In reversing summary judgment on the monopolization claim, the court concluded that the "evidence as a whole could lead a reasonable jury to conclude that Barr and . . . Brantford intended to take advantage of . . . Brantford's clathrate monopoly, intended to create a monopoly for Barr in the generic warfarin sodium industry, and intended to keep their agreement so that [plaintiffs] would not take steps to develop an alternate source." The court added that while "there may be some pro-competitive benefits of exclusive supply agreements, it is difficult to conceive of the pro-competitive benefits that would be derived from this level of deception, and, also, it is difficult to believe that defendants' advantage came about through better business practices or historical accident."

In resurrecting the conspiracy claim, the court concluded that the “testimony as a whole as well as the various memos and internal documents support an inference of conscious, concerted action intended to take advantage of . . . Brantford’s monopoly on clathrate. Plaintiffs presented circumstantial evidence that Barr and . . . Brantford conspired to control the only source of clathrate available and to deceive plaintiffs so that plaintiffs would not take steps to develop an alternate supply. There was evidence that Barr demanded the confidentiality agreement [with Brantford] in order to delay [plaintiffs’] entry and thwart the development of alternative supplies. Testimony further showed that both Barr and . . . Brantford understood the confidentiality agreement to require silence by . . . Brantford in its dealings with [plaintiffs], suggesting that . . . Brantford’s deceptions were in furtherance of the agreement.”

The result in *Geneva Pharmaceuticals* demonstrates the fact-intensive nature of these antitrust disputes. Defendants often are successful in using expert economic testimony and antitrust doctrines to avoid being subjected to trial on Section 1 and Section 2 claims. But if the facts do not support the defendants’ attempt to define the relevant market as broadly as possible, and there is documentary evidence supporting a conclusion of anticompetitive motivation, companies that thought they were behaving in an aggressive but lawful manner may find themselves faced with a serious threat of treble damages and other court-imposed liabilities.

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## **NCAA WINS SUMMARY JUDGMENT MOTION AGAINST MIBA**

On September 30, the National Collegiate Athletic Association (“NCAA”) defeated a motion for summary judgment seeking to hold it liable under Section 1 and Section 2 of the Sherman Act for implementing a rule that precludes 65 of the best college basketball teams in the country from participating in postseason tournaments other than the one sponsored by the NCAA. (*See Metropolitan Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, S.D.N.Y., No. 01 Civ. 0071, 9/30/04). In her ruling, Judge Miriam G. Cedarbaum found that the plaintiff, an NCAA-affiliated organization that sponsors the only rival postseason college basketball tournament, would have to prove that the NCAA’s Commitment to Participate Rule had anticompetitive effects to prevail on a claim under Section 1 and would have to demonstrate that the NCAA had specific intent to monopolize to win under Section 2.

The suit was filed by the Metropolitan Intercollegiate Basketball Association (“MIBA”), an unincorporated association of five New York area colleges and universities. MIBA is an affiliated member of the NCAA, the governing body for 23 college sports. MIBA has conducted a Postseason National Invitational Tournament (Postseason NIT) since the 1930s. Approximately 40 teams currently compete by invitation in the Postseason NIT. The NCAA hosts the only other postseason tournament for its Division I member teams, the NCAA Division I Men’s Basketball Championship Tournament (“NCAA Tournament”).

MIBA argued that the NCAA has been attempting to restrict competition from the Postseason NIT since the mid-1940s. Until 1953, however, NCAA member institutions were allowed to participate in

both tournaments, if invited. In 1953, the NCAA changed its rules to prohibit member institutions from participating in more than one postseason tournament. Thereafter, the NCAA rules on postseason tournaments became more restrictive, as the size of its own tournament expanded from 22 teams in 1953 to 65. The rule at issue, the Commitment to Participate Rule, is a 1981 revision to a rule specifying that member institutions were expected to participate in NCAA championship tournaments. The revised rule ended uncertainty about a team's obligation to participate in the NCAA championship, if invited. Although there were further revisions to the Commitment to Participate Rule in 1991, 1999, and 2000, Judge Cedarbaum observed that the essence of the rule was unchanged. Member institutions risked fines and sanctions for breaking NCAA rules, and there was evidence in this case that the NCAA would view a failure to comply with the Commitment to Participate Rule as a major violation of its rules.

In its suit, MIBA sought treble damages and injunctive and declaratory relief from several NCAA rules, which allegedly were adversely impacting the Postseason NIT. MIBA's motion for summary judgment related only to the Commitment to Participate Rule, but its broader claim was that the combined effect of several rules prevented it from postponing the Postseason NIT until after the NCAA Tournament or competing for the teams who participate in that tournament. MIBA viewed the Commitment to Participate Rule as effectuating a boycott of the Postseason NIT and argued that the rule should be stricken as a violation of Section 1 and Section 2 without detailed market analysis. NCAA countered that boycott analysis was improper and that MIBA was not entitled to summary judgment because the rule had no obvious anticompetitive effects.

The court declined to relieve MIBA of its burden of showing anticompetitive effects under the rule of reason. This is only allowed under the rule of reason analysis if the anticompetitive effects of the challenged conduct are obvious. Here, the Judge held that it was not obvious that the challenged rule had anticompetitive effects. In particular, the court explained that MIBA could extend invitations to its tournament to any of the 260 teams not invited to the NCAA tournament and MIBA had not presented any evidence that it had been unable to fill its Postseason NIT bracket each year. In denying summary judgment to MIBA on its Section 2 conspiracy to monopolize claim, the court explained that the parties disputed the "specific intent" element of the offense. Specifically, the parties disagreed as to whether the Commitment to Participate Rule was adopted "with the specific intent of suppressing competition from the NCAA Tournament's competitors."

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## **DOJ WHITE COLLAR CRIME UPDATE**

### **White Collar Crime Continues as a Priority for the Antitrust Division**

The Antitrust Division continues to send a strong message to corporations and corporate executives engaged in potential bid rigging and price-fixing schemes. Recent investigations of the E-Rate program, fish distribution and the synthetic rubber industry have resulted in guilty pleas and indictments.

### **E-Rate Investigation**

On October 22, Qasim Bokhari and Haider Bokhari pleaded guilty to charges of conspiracy,

fraud, and money laundering involving a federal program, E-Rate, that subsidizes telecommunications services, Internet access and internal computer and communications networks to disadvantaged schools and libraries.

A federal grand jury in Milwaukee returned a superseding indictment against Qasim Bokhari, the owner and president of a Virginia computer consulting company, and his two brothers, Haider Bokhari, and Raza Bokhari, who acted as agents of the company, on September 23. Each of these individuals was originally charged in a March 16, 2004 indictment filed under seal and unsealed after the arrest of Qasim Bokhari and Haider Bokhari on April 1, 2004. At the time of their arrest, citing the risk of flight, the court ordered Qasim Bokhari and Haider Bokhari, both citizens of Pakistan, to be held in prison pending trial. The third brother, Raza Bokhari, a naturalized U.S. citizen, is still a fugitive from justice.

The superseding indictment included the original charges of one count of conspiracy to commit mail fraud, three counts of mail fraud, one count of conspiracy to commit money laundering, and one count of money laundering against Qasim Bokhari and Haider Bokhari. As to Raza Bokhari, the superseding indictment included the original charge of one count of conspiring to commit money laundering and added one count of conspiring to commit mail fraud, three counts of mail fraud, and one count of money laundering against him. The superseding indictment also added certain additional allegations concerning the schools for which E-Rate funding was sought but not obtained.

According to court papers, in 2001, Qasim Bokhari and his company submitted applications for E-Rate Program funding on behalf of 21 schools in the Milwaukee and Chicago areas

totaling more than \$16 million. Qasim Bokhari and his company eventually received more than \$1.2 million for goods and services that were not provided to three of these schools. The superseding indictment also charges all three individuals with money laundering and conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956(a) and 1956(h).

The investigation was conducted jointly by the Department's Antitrust Division, the Federal Bureau of Investigation, the Criminal Investigation Division of the Internal Revenue Service, and the Inspector General's Office of the Federal Communications Commission, with assistance from the U.S. Attorney's Office for the Eastern District of Wisconsin.

The guilty pleas announced today resulted from an ongoing investigation by the Antitrust Division and the FCC of unlawful conduct concerning the E-Rate Program. The Chicago Field Office of the Antitrust Division is continuing to investigate potential bid rigging, fraud, kickbacks, bribery, or other crimes related to the E-Rate Program.

### **Fish Distributor Charged With Obstruction of Justice**

On October 19, Pool Fish Distributors Inc. ("Pool Fish Distributors"), an Arkansas fish distributor, was charged with obstructing the grand jury investigation of a suspected conspiracy to fix the price of feeder goldfish sold in the United States. Feeder goldfish are used as food for other ornamental and desirable fish.

Pool Fish Distributors was charged in U.S. District Court in Cleveland with obstruction of justice for intentionally delaying the production of documents that the grand jury subpoenaed that were material to its investigation. According to



the charge, between June 19, 2002 and May 2004, Pool Fish Distributors intentionally delayed the production of documents in response to grand jury subpoenas, which caused the grand jury not to consider the relevance of the documents before the statute of limitations had expired on the alleged offenses.

The Division's ongoing investigation into suspected price fixing in the feeder goldfish industry is being conducted by the Cleveland Field Office with assistance from the FBI. This case sends a strong message that the Antitrust Division will prosecute those who obstruct grand jury investigations and attempt to prevent the Division from detecting and prosecuting price fixing conspiracies.

### **Synthetic Rubber Investigation**

On October 13, Bayer AG, a German corporation, agreed to plead guilty and to pay a \$4.7 million criminal fine for participating in a conspiracy to fix the prices of synthetic rubber which is used to manufacture a variety of products including automotive parts. The rubber, acrylonitrile-butadiene, which is also known as NBR, is also used to manufacture hoses, belting, cable, o-rings, seals, adhesives, and sealants. The charge is the first in an ongoing investigation of price fixing in the NBR industry.

According to the one-count felony charge filed in the U.S. District Court in San Francisco, Bayer AG conspired from May, 2002 through December, 2002 with unnamed co-conspirators to suppress and eliminate competition for NBR in the United States and elsewhere. Under the plea agreement, which must be approved by the court, Bayer AG has agreed to assist the government in its ongoing investigation.

The Department charged that Bayer AG and unnamed co-conspirators carried out the conspiracy by:

- participating in conversations and meetings to discuss prices of NBR to be sold in the United States and elsewhere;
- agreeing, during those conversations and meetings, to raise and maintain prices of NBR to be sold in the United States and elsewhere; and
- issuing price announcements and price quotations in accordance with the agreements reached.

The charge is the result of an ongoing investigation being conducted by the Antitrust Division's San Francisco Field Office and the FBI in San Francisco.

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## **RECENT ACTIVITIES**

### **DOJ ANTITRUST HIGHLIGHTS**

- On October 25, the DOJ announced that AT&T Wireless, Inc. ("AT&T") and Cingular Wireless Corporation ("Cingular") entered into a consent decree to allow the merger of the two wireless carriers and broadband service providers. According to the press release the DOJ contended that markets for wireless communications were local and that in ten such markets the merger would reduce competition. The DOJ also contended that broadband markets were local and that in three such markets the merger would reduce competition. The press release also explained that two of a limited number of mobile wireless services providers have launched or are likely to launch mobile wireless broadband services, which offer data speeds

## **RECENT ACTIVITIES**

### **DOJ Antitrust Highlights (Continued)**

four to six times faster than existing service. To resolve concerns, the parties agreed to divest AT&T's mobile wireless services business, including spectrum and customer contracts, in parts of Connecticut (Litchfield), Kentucky (Fulton), Oklahoma (Oklahoma City and Ponca City), and Texas (Lufkin/Nacogdoches). The merged firm must also divest minority equity interests in mobile wireless services providers in FCC licensing areas in Georgia (Athens), Kansas (Topeka), Louisiana (Shreveport, Monroe), Massachusetts (Pittsfield), and Missouri (St. Joseph), although it may retain its minority interests in Kansas, Louisiana, and Missouri if those interests are made irrevocably and entirely passive to the satisfaction of the Division. To resolve the Department's competitive concerns related to mobile wireless broadband services, the merged firm must divest 10 MHz of contiguous PCS wireless spectrum in parts of Michigan (Detroit), Tennessee (Knoxville), and Texas (Dallas-Fort Worth). In Knoxville, the merged firm can alternatively restructure AT&T's existing relationship with another spectrum licensee in the market to the satisfaction of the Division so that the merged firm has no equity, managerial, or other interest in the licensee and the Division's competitive concerns are resolved. *See* also FCC Antitrust Highlights at p. 18.

- On October 21, the Antitrust Division released an "Antitrust Division Policy Guide to Merger Remedies" that sets forth the Division's policies on merger remedies and describes the legal and economic underpinnings of those policies. The guide provides the business community, antitrust bar, and economists with an understanding of the Division's analytical framework for crafting and implementing relief in merger cases. The guide concentrates on remedies that allow mergers to proceed with modifications rather than blocking them. After setting forth a number of guiding principles for the development of remedies in all Antitrust Division merger cases, the guide emphasizes the following important points: (1) structural remedies involving the divestiture of physical or intangible assets are preferred to conduct remedies; conduct remedies are appropriate only in limited circumstances; (2) the divestiture must include all assets necessary for the purchaser to be an effective, long-term competitor, including critical intangible assets; (3) the divestiture of an existing business entity that possesses all of the assets necessary for the efficient production and distribution of the relevant product is preferred to a partial divestiture; (4) if the Division believes the merger will result in a violation, the Division will be willing to forego filing a case and accept instead a structural "fix" that the parties implement before the merger is consummated as long as it fully eliminates the competitive harm arising from the merger; and (5) the Division will ensure that remedies are completely implemented and will fully enforce its judgments.
- On October 6, Deputy Assistant Attorney General Makan Delrahim spoke before the George Mason Law Review Symposium regarding convergence as it applies to antitrust and intellectual property laws. Mr. Delrahim's discussion about convergence in the application of antitrust to intellectual property referred to "the goal of reaching consensus on antitrust enforcement strategies that are grounded in sound economic theory, not mere coincidence in the application of antitrust law to specific cases." Because antitrust authorities' enforcement policies help shape international business practices, consensus-based antitrust enforcement is vital to global business and consumer welfare. He covered intellectual property licensing and discussed several specific examples that illustrate areas of convergence and divergence between the U.S. and EU. Mr. Delrahim also suggested how, in some areas, a period of constructive divergence may ultimately help the U.S. and EU

## **RECENT ACTIVITIES**

### **DOJ Antitrust Highlights (Continued)**

reach consensus in the future. He concluded that, although extraordinary strides have been made towards convergence between the U.S. and EU in the application of antitrust law to intellectual property rights, there are still particular areas around the edges where differences remain. While Mr. Delrahim speculated on the reasons for the difference, he emphasized that the focus should be on a process of constructive divergence to bridge the gap.

- On October 1, the Antitrust Division announced that it would not appeal the decision of the U.S. District Court for the Northern District of California in the Oracle/Peoplesoft merger case. The decision was surprising for a couple of reasons. First, the Division believed the evidence, including the testimony of numerous customers, strongly supported its case against Oracle Corp.'s proposed acquisition of Peoplesoft, Inc. Second, the Division clearly disagreed with some of the legal observations in the district court's opinion. That being said, the Division realized that an appeal would be difficult because the ultimate outcome of the merger case rested on Judge Walker's detailed factual findings that would receive great deference in the appellate process.

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## **FTC ANTITRUST HIGHLIGHTS**

- On October 29, following a public comment period, the Commission approved a final consent order in the matter concerning General Electric Company ("GE") and InVision Technologies, Inc. ("InVision"). The vote to approve the order as final was 3-0-2, with Commissioner Pamela Jones Harbour recused and Commissioner Jon Leibowitz not participating. Shortly thereafter, on November 2, the Commission received a petition for approval of proposed divestiture from GE related to the FTC decision and order. Under the terms of the order, within six months of the date the consent agreement was executed GE was required to divest its "X-Ray Nondestructive Technology ("NDT") Business," as that term is defined in the order, to a Commission-approved buyer. In its petition, GE has requested Commission approval to divest the X-Ray NDT Business assets to Prinzipal 26. V V GmbH, a subsidiary of Andlinger & Company, Inc. The FTC is accepting public comments on the proposed divestiture for 30 days, until December 1, 2004, after which it will decide whether to approve it.
- On October 29, the Commission approved a proposed divestiture by Sanofi-Synthelabo and Aventis. The company's application concerned the final consent order issued to address competition problems raised by Sanofi's acquisition of Aventis. Under the terms of the decision and order in this matter, Sanofi was required to divest certain assets and royalty rights to ensure that competition was maintained following the consummation of the transaction. In its petition, the companies requested Commission approval to divest the "Estorra Royalties," as that term is defined in the order, to Paul Royalty Fund II, L.P., a limited partnership under the control of Paul Capital Partners and PRF Sleep Holdings, LLC, an affiliate of Paul Royalty Fund.

## **RECENT ACTIVITIES**

### **FTC Antitrust Highlights (Continued)**

- On October 26, the Commission approved a proposed divestiture by American Air Liquide, Inc. (“Air Liquide”). The company’s petition for approval of the proposed divestiture related to the FTC’s recent decision and order concerning Air Liquide’s acquisition of Messer Griesheim GmbH. The order requires Air Liquide to divest certain assets acquired from Messer Griesheim. In its petition, Air Liquide requested prior Commission approval to divest the “Atmospheric Gases Divestiture Assets and Businesses,” as that term is defined in the order, to Matheson Tri-Gas, Inc., a wholly owned subsidiary of Nippon Sanso Corporation of Japan, or to one or more Matheson Tri-Gas subsidiaries. The FTC has now approved that request. The Commission vote to approve the proposed divestiture was 4-0-1, with newly appointed Commissioner Jon Leibowitz not participating.
- On October 20, the attorneys general of several states announced their submission, for approval by the U.S. District Court for the District of New Jersey, of a settlement agreement with Akzo Nobel, N.V., and its subsidiary, Organon USA Inc. (collectively, “Organon”), resolving the States’ allegations that Organon violated the antitrust laws by engaging in various anticompetitive acts relating to its anti-depressant drug, Remeron. The States’ complaint alleges, among other things, that Organon made a “fraudulent misrepresentation” to the FDA about the claims of a patent listed in the FDA’s Orange Book, so as to delay by approximately eight months the introduction of generic competition to Remeron. Under the settlement, Organon would pay tens of millions of dollars in damages and become subject to strong injunctive terms barring future anticompetitive conduct.

FTC staff conducted a parallel, nonpublic investigation regarding Organon’s conduct. The FTC staff’s investigatory record contains significant evidence indicating that Organon may have violated Section 5 of the Federal Trade Commission Act by knowingly making misleading statements to the FDA in order to delay introduction of generic competition to Remeron. FTC staff closely coordinated their investigation with the States. Working with the States, FTC staff took the lead in developing and negotiating the injunctive terms that are encompassed in the States’ proposed settlement. In consideration of the comprehensive, effective, and appropriate injunctive terms contained in the States’ proposed settlement, the FTC’s investigation into Organon’s activities relating to Remeron has been closed.

- On October 20, the Commission received an application from AspenTechnology, Inc. (“AspenTech”), requesting FTC approval to divest its Engineering Software Assets, as that term is defined in the Commission’s proposed order announced on July 15, 2004, to Honeywell International, Inc. (“Honeywell”). Under the terms of the proposed order, AspenTech is required to divest the Engineering Software Assets within 90 days of the date the order becomes final. AspenTech and Honeywell executed the purchase agreement on October 6, 2004. A public copy of AspenTech’s application can be found on the FTC’s Web site as a link to this press release. The FTC is accepting public comments on the proposed divestiture for 30 days, until November 18, 2004.
- On October 12, the staffs of the Federal Trade Commission and the Antitrust Division of the Justice Department jointly issued a letter urging the Massachusetts House of Representatives to adopt a bill that would enable non-lawyers to compete with lawyers to perform certain real estate closing services. According to the agencies, competition is likely to lower prices and enable consumers to receive better services. The bill, HB 180, would amend the General Laws of Massachusetts to authorize non-lawyers to perform real estate closing services,

## **RECENT ACTIVITIES**

### **FTC Antitrust Highlights (Continued)**

such as drafting deeds, mortgages, leases and agreements; examining titles; issuing title certification or policies of title insurance; and representing lenders as their closing agents. “As the staff analysis shows, HB 180 is likely to benefit consumers in Massachusetts by encouraging competition that leads to lower prices, more convenient services, and the option to use Internet-based loan services,” noted FTC Chairman Deborah Platt Majoras. “The bill likely will lower prices for real estate closings for Massachusetts consumers in two ways,” said R. Hewitt Pate, Assistant Attorney General in charge of the Justice Department’s Antitrust Division. “First, consumers will be able to choose to use a non-lawyer instead of an attorney for their closings. Historically, lawyers charge more than lay providers. Second, with competition from non-lawyers, lawyers’ fees are likely to decrease.”

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## **FTC CONSUMER PROTECTION HIGHLIGHTS**

- On November 4, the FTC announced that it had charged New Jersey-based NorVergence, Inc. (“NorVergence”) with making misleading claims relating to dramatic savings on their monthly telephone, cellular, and Internet bills, and the purported availability of unlimited long-distance and cellular minutes at no extra cost. According to the FTC, NorVergence claimed the savings were partially the result of a “black box” that it would install on customers’ premises. The complaint, which was filed in federal district court in New Jersey, stated that the black boxes (rented to customers for inflated prices of between \$400 and \$5,700 per month) were nothing more than standard telephone routers. The FTC maintained that in reality, NorVergence had no long-term contracts with telecommunications providers and no way to assure the long-term discounts it promised.
- The FTC has been fairly active this past month in fulfilling its responsibilities under the Fair and Accurate Credit Transaction Act, or “FACTA.” On November 3, the agency announced that it was seeking comments in determining a “fair and reasonable fee” for credit scores under the new laws. On October 29, the FTC issued final rules under FACTA that provide certain clarifications necessary to effect the Act’s purpose. The final rules define “identity theft,” and “identifying information,” and require a 12 month duration for active duty alerts. The rules also require the credit reporting agencies to develop minimum reasonable requirements for appropriate proof of identity needed to block information resulting from identity theft on their consumer reports and place or remove fraud or active duty alerts, or truncate their Social Security number in their file disclosures. The final rule and accompanying comments are available at: <http://www.ftc.gov/os/2004/10/041029idtheftdefsrn.pdf>. FACTA amended the Fair Credit Reporting Act in 2003 by providing consumers with the ability to place fraud alerts on their credit reports and “block” credit report information resulting from identity theft.
- On October 28, FTC’s Consumer Protection Acting Director Lydia Parnes stated in a speech before the International Association of Privacy Professionals that identity theft and privacy issues would remain a top priority for the agency. According to her speech, the FTC has filed 63 spam-related cases against 164 individual

## **RECENT ACTIVITIES**

### **FTC Consumer Protection Highlights (Continued)**

and corporate defendants. Parnes' speech highlighted a number of regulatory initiatives that raise identity theft and privacy concerns, such as the use of radio frequency identification (or "RFID") technology, the development of the National Fraud Alert System, and the filing of the agency's first spyware case. According to Parnes, "Privacy protection efforts will continue to occupy a central role in [the FTC's] consumer protection mission."

- The FTC announced that it settled claims filed in federal district court that the marketers of the "Balance Bracelet" failed to possess adequate substantiation for advertising claims that the bracelet alleviated pain symptoms resulting from arthritis, joint, back, and injury-related pain. The agency filed its lawsuit against Maverick Media, Inc. and its officers Mark Jones and Charles Cody in May of this year while a class action lawsuit was pending in state court in California. The settlement, which prohibits the defendants from making misrepresenting claims about pain alleviation products and requires them to pay \$400,000 to a settlement fund, is part of a global settlement that includes class action plaintiffs who already filed claims in state court when the FTC first initiated its suit.
- On October 22, former Mark Nutritionals, Inc. founder, Harry Siskind, agreed to a \$155 million judgment against him due to his falsification of financial information in an attempt to hide assets from the FTC in order to obtain a more favorable settlement. The agency had originally settled claims against Mr. Siskind and other defendants relating to the marketing of Mark Nutritionals' Body Solutions Evening Weight Loss formula and other products requiring Mr. Siskind to pay \$500,000 as part of the settlement. The settlement also contained \$155 million suspended judgment that would be reinstated if it was found that his financial disclosures contained false information. In May 2004, the FTC filed a motion that detailed Mr. Siskind's falsification of financial information, which then triggered the reinstatement of the \$155 million. Mr. Siskind agreed to the reinstatement of the full settlement amount just prior to a hearing on the FTC's motion.
- On October 12, the FTC announced that it has joined forces with a number of law enforcement agencies in other countries to combat unwanted spam e-mails on a global level by adopting an international Action Plan on Spam Enforcement. The plan was announced on October 11 at an international forum on spam enforcement techniques, hosted by the FTC and the Office of Fair Trading of the United Kingdom.

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## **INTERNATIONAL ANTITRUST HIGHLIGHTS**

- On October 28, the European Commission announced that it had agreed on a Memorandum of Understanding with the Republic of Korea regarding bilateral cooperation in the antitrust field. The signing of the Memorandum of Understanding between Korea and the EU provides a formal basis for enhanced bilateral cooperation between the two parties. It establishes a permanent and transparent forum for consultation and

## **RECENT ACTIVITIES**

### **International Antitrust Highlights (Continued)**

cooperation in this area. In particular, it is hoped that the bilateral cooperation can foment: improvements in the respective legal frameworks governing anticompetitive business behavior, merger control, and anticompetitive government regulation; exchange of experience in the field of case investigation; and, exchange of experience and views on substantive antitrust policy issues. In addition, the two parties are keen to promote and strengthen cooperation in the field of antitrust law enforcement. The Commission has previously concluded dedicated cooperation agreements in antitrust matters with the United States and Canada.

- On October 28, following the European Parliament's threatened veto of the entire incoming European Commission, and the subsequent withdrawal of the candidatures of all incoming Commissioners, it appears that Mario Monti will temporarily stay on as European Competition Commissioner until the EU's political process is finalized. There are also numerous suggestions that Ms. Kroes may be moved from her nominated competition post given the potential conflicts with her numerous previous business interests and her poor European parliamentary confirmation hearing. Pervenche Beres, head of the European Parliament's antitrust committee, said that Ms. Kroes had failed to show the qualities necessary "for exercising the responsibilities of the competition job."
- On October 27, Russia's director of the Federal Anti-Monopoly Service, Igor Artemyev, stated that he intended to stiffen Russia's antitrust legislation and increase sanctions against offenders. He said that his department would present to the Russian Duma draft amendments to antitrust legislation by the end of December. He would like to see the activities of natural monopolies brought under real control, and said that at present, fines for contravention of the law "cannot be taken seriously." The amendments would see that companies found guilty of an abuse of a dominant position would be fined 2% of their previous year's turnover, and those found guilty of cartel activity would be fined 4% of their previous year's turnover.
- On October 27, Shang-Ming, the head of China's Ministry of Commerce's antitrust office (established in September), said that China plans to accelerate the drafting of an antitrust law. Such a law is on the agenda of the Tenth National People's Congress, and the absence of a law to date has been a source of concern. Draft legislation, which deals with monopoly agreements, abuse of dominance, mergers and administrative monopolies, has been distributed to state departments for comments, but is subject to further revision.
- On October 26, the European Commission announced that it had decided to close its investigations into aspects of the contracts between a number of Hollywood film studios and European pay-tv companies. The European Commission decided to close its investigation into the so-called Most Favored Nation ("MFN") clauses found in the contracts of the Hollywood film studios with a number of pay television companies in the European Union after the studios decided to withdraw the clauses. The case remains open with regard to NBC Universal and Paramount Pictures Corp. Inc. that still hold on to them. The Commission's competition services believe that these clauses have the effect of aligning the prices of the broadcasting rights bought by the television companies.

## **RECENT ACTIVITIES**

### **International Antitrust Highlights** *(Continued)*

- On October 26, the European Commission announced that it had decided to grant unconditional approval under Article 8(2) of the old EC Merger Regulation (Regulation 4064/89) to Oracle Corp's proposed acquisition of PeopleSoft Inc. The Commission was principally concerned that the transaction would combine two of the largest suppliers and reduce the number of key players in certain applications software markets from three to two (Oracle/PeopleSoft and SAP). The Commission concluded that there are separate global markets for "high function" Human Resource and Financial Management Software purchased by large and complex enterprises. Due to the high level of functionality required by such "tier one" or "enterprise" software, it is distinct from the markets for such software supplied to smaller companies ("mid market" software). The Commission, however, concluded that the removal of PeopleSoft as an independent player in these markets would not cause competition concerns as the relevant markets would all remain competitive. The merger was approved in the U.S. in September following Oracle's success in challenging the DOJ's initial adverse findings. The Commission notes that it cooperated closely with the DOJ and that it took into account evidence that was presented to the U.S. courts. At a year in length, this was the longest ever Commission investigation under the EC Merger Regulation.
- On October 26, Mexico's Commission Federal de Competencia ("CFC") cleared the merger between Aeromexico and Mexicana, subject to conditions. Both airlines are subsidiaries of Cintra, the publicly owned company created in 1995 to bail Aeromexico and Mexicana out of bankruptcy. The remedies imposed on the operation, which precedes the privatization of Cintra, consist of the divestment of two subsidiaries of Aeromexico and Mexicana – Aerolitoral and Aerocaribe. These subsidiaries will be merged into a single entity. In the process of privatization, the companies resulting from the mergers, Aeromexico-Mexicana and Aerolitoral-Aerocaribe will be sold to different investors. This approach will result in the existence of two competing airlines.
- On October 22, the Irish High Court found a credit union association guilty of abusing its dominant position, handing the Irish Competition Authority its first positive judgment in a civil public enforcement case. Judge Nicholas Kearns found in favor of the Competition Authority's first ever decision in an abuse of a dominant position case. The Irish League of Credit Unions was said to have broken Irish antitrust law by requiring credit unions to be members before they could avail themselves of a particular protection scheme. By requiring members to take out loan protection and life savings cover with a life assurance company it controls, the League was alleged to be abusing its position in the market for credit union representation. The League represents 516 affiliated credit union members throughout Ireland. The case is one of the first cases brought against a voluntary organization and may set a key precedent. Former FTC Commissioner Terry Calvani is a member of the Irish Competition Authority and Director of its Cartels Division.
- On October 19, the European Commission announced that it had received proposed commitments from the Coca-Cola Company, which it considers may be sufficient to settle its investigation into alleged infringements by Coca-Cola of Article 82 of the EC Treaty. The Commission has been conducting an investigation into Coca-Cola's business practices in the EU for five years. The Commission has not at this stage explained the particular competition concerns that it has identified. However, it is clear from the terms of the commitments that the



## **RECENT ACTIVITIES**

### **International Antitrust Highlights (Continued)**

Commission is concerned that Coca-Cola has been using its market strength to impose terms on retailers that foreclose the market to other soft drinks manufacturers. The Commission states that the commitments offered by Coca-Cola will have the effect of introducing more competition to the EU markets for carbonated soft drinks and will increase consumer choice in shops and at cafes.

- On October 18, it was reported that South Africa's largest gold company, Harmony, had made a hostile bid for its domestic rival, Gold Fields, valuing it at \$8.1 billion. A merger would create the world's number one gold mining company in terms of gold reserves and number two by market capitalization. Despite the backing of its largest shareholder, the Russian company Norilsk Nickel, Gold Fields has rejected Harmony's offer. Gold Fields says that it will proceed with its current \$2.1 billion acquisition of Canadian gold miner Iamgold. Gold Fields is South Africa's second largest gold producer, producing more than four million ounces annually at mines in South Africa, Ghana and Australia. Harmony became the sixth largest gold miner in the world when it acquired ARMgold in 2003. It produces more than three million ounces of gold annually and runs operations in South Africa, Australia and Papua New Guinea.
- On October 13, Canada's competition bureau approved the merger of brewers Molson and Coors, which will create the world's fifth largest brewer by volume. The merger, which will see the creation of Molson Coors brewing, still faces some opposition from a member of the Molson family and some Canadian pension funds. The U.S. FTC had previously approved the merger.
- On October 13, Japan's Fair Trade Commission proposed cuts in the penalties for those companies who notify the Commission of illegal practices in which they were involved. The changes to the Anti-Monopoly law are included in the draft revisions to the law, which have been presented to the ruling Liberal Democratic Party. Under the proposed changes, the first company to turn itself in before a raid would be free from penalties, and the second and third firms would be given 50% and 30% reductions respectively. Those confessing voluntarily after an inspection would also be given some reduction. It is planned to seek parliamentary approval during the current extraordinary Diet session.
- On October 12, it was announced that the French antitrust authorities were investigating possible price-fixing in the toy sector in 2002 and early 2003. The investigation concerns the supermarket group Carrefour Sam, and the Danish toy maker, Lego Systems AS. Sources close to the case said that Carrefour had been raided, and it was also reported that Lego had replaced its head of operations following an internal investigation, which revealed that the company guidelines had been violated.

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## **RECENT ACTIVITIES**

### **FCC ANTITRUST HIGHLIGHTS**

- On October 22, the Baby Bells gained additional deregulation for fiber deployments in an FCC decision that represents another step in establishing broadband parity between the phone giants and cable operators. In the ruling, the FCC decided to take recent decisions to deregulate Bells' fiber deployments to the home and curb and extend them to unbundling requirements found in telecommunications-law provisions that govern Bell entry into the long-distance market. The Bells had asked the Commission to broaden the initial rulings to ensure that the agency's previous actions could not be diminished by regulatory provisions in the long-distance entry rules. "The FCC found that the relief included in this decision will benefit consumers by making the [Bells] more vigorous competitors to cable-modem service, which plays a significant role in the current broadband market," the FCC said in a press release. However, FCC commissioner Michael Copps dissented, saying that the ruling would mean that broadband providers that did not own their own fiber lines would lose "competitive access to last-mile bottleneck facilities." In addressing the Bell-monopoly argument, FCC Commissioner, Kathleen Abernathy, noted that "Cable operators enjoy a significant lead over wireline incumbents" in signing up high-speed-data customers. "It is difficult to justify saddling the less-dominant platform – but not the market leader – with unbundling obligations."
- On October 26, the FCC consented to the applications filed in connection with the proposed merger of Cingular Wireless Corporation and AT&T Wireless Services, Inc., subject to a number of conditions. The Commission denied all of the petitions filed in opposition to the merger, finding that the merger as conditioned would serve the public interest. The Commission consented also to two related sets of applications; (1) the applications filed by Cingular and T-Mobile USA, Inc. in connection with the unwinding of their GSM network infrastructure joint venture in portions of California, Nevada, and New York, and (2) the applications filed by Triton PCS, Inc. and AT&T Wireless to exchange spectrum in portions of North Carolina and Georgia.

The Commission analyzed the market for mobile telephone services and concluded that the companies had demonstrated that the proposed merger will serve the public interest, convenience, and necessity. Further, the Commission concluded that the likely public interest benefits of the merger outweigh the potential public interest harms. Moreover, it found that the acquisition generally is not likely to cause competitive harm in most mobile telephone markets. In reaching these conclusions, the Commission analyzed many factors regarding the likely horizontal effects of the merger, including substitutability of products and services, possible competitive responses by rival carriers, spectrum aggregation, deployment of advanced wireless services, network effects on the merged company, and penetration rates in local markets. The Commission concluded that anticompetitive effects are unlikely in all but 22 of the Commission's 734 Cellular Market Areas, where the merger would cause significant competitive harm that exceeds its likely public interest benefits. The Commission conditioned its consent on the companies taking certain actions to ameliorate the anticompetitive effect of the merger in those markets. This generally included the Commission prohibiting the companies' plan to merge their mobile telephone businesses in particular markets or its requiring the divestiture of problematic spectrum. *See DOJ Antitrust Highlights at p. 9.*

## **RECENT ACTIVITIES**

### **FCC Antitrust Highlights (Continued)**

- On October 14, as part of its goal to promote access to broadband services for all Americans and to encourage new facilities-based broadband platforms, the FCC adopted changes to Part 15 of its rules to encourage the development of Access Broadband over Power Line (“Access BPL”) systems while safeguarding existing licensed services against harmful interference. Access BPL is a new technology that provides access to high speed broadband services using the largely untapped communications capabilities of the nation’s power grid. By facilitating access to BPL, the Commission took an important step toward increasing the availability of broadband to wider areas of the country because power lines reach virtually every home and community. In areas where consumers already have broadband access, BPL can enhance competition by providing another broadband alternative. Access BPL will also facilitate the ability of electric utilities to dynamically manage the power grid itself, increasing network reliability by remote diagnosis of electrical system failures.
- On October 14, the FCC announced it adopted a *Notice of Inquiry* (“Notice”) that fulfills a commitment that the Commission made in March 2004 in the *ISP Reform Order* to develop a record on foreign mobile termination rates. The Notice seeks to further develop the Commission’s understanding of the possible effects of foreign mobile termination rates on U.S. customers and competition in the U.S. international telecommunications services market. In particular, the Notice solicits comments on foreign mobile termination payment arrangements and on payment flows between carriers that terminate mobile calls in certain foreign countries. It also requests data and information on foreign mobile termination rates, actions taken by foreign regulators with respect to these rates, and on competitive concerns raised in the FCC’s *ISP Reform* proceeding. Finally, the Notice seeks comments and information on the appropriate framework for evaluating whether foreign mobile termination rates are unreasonably high.

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